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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVID MENDOZA, Defendant and Appellant.	F075690 (Super. Ct. No. BF166616A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. John S. Somers, Judge.

Gordon B. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Peña, J. and Snauffer, J.

A jury convicted appellant David Mendoza of second degree burglary (Pen. Code, § 460, subd. (b)).[1] In a separate proceeding, the court found true seven prior prison term enhancements (§ 667.5, subd. (b)) and allegations that Mendoza had two prior convictions within the meaning of the "Three Strikes" law (§ 667, subds. (b)-(i)).

On appeal, Mendoza contends the evidence is insufficient to sustain the court's true findings with respect to four of his prior prison term enhancements. We find merit to this contention, strike the four enhancements at issue, and affirm the judgment as modified.

Additionally, Mendoza requests that we review the sealed record of the trial court's in camera *Pitchess*[2] hearing to determine whether police officer personnel records were erroneously deemed not discoverable. Having conducted the requested review, we find no abuse of discretion.

FACTS[3]

On February 6, 2017, the prosecutor filed an information that, in pertinent part, charged Mendoza with eight prior prison term enhancements. The information was subsequently amended to allege another prior prison term enhancement for a total of nine such enhancements that are based on the following convictions, listed in reverse chronological order:

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1 All further statutory references are to the Penal Code, unless otherwise noted.

2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

3 The facts underlying Mendoza's burglary conviction are omitted because they are not germane to the issues he raises.

Prior	Date of Judgment	Offense
1	August 28, 2015	§ 487, subd. (a)
2	September 10, 2007	§ 245, subd. (a)(1)
3	April 26, 2006	Veh. Code, § 10851, subd. (a)
4	December 17, 1996	Health & Saf. Code, § 11350, subd. (a)
5	September 30, 1994	§ 211
6	September 25, 1991	§ 4530, subd. (b)
7	November 8, 1989	Health & Saf. Code, § 11352
8	July 9, 1986	Former § 666
9	October 17, 1985	§ 459

On April 25, 2017, during the bench trial of the prior conviction allegations, defense counsel argued that the prior prison term enhancements that were based on Mendoza's 1986 conviction for petty theft with a prior and his 1996 conviction for possession of drugs were not valid because each conviction had been reduced to a misdemeanor (priors 4 and 8).[4] The court agreed and found true only the remaining seven prior prison term enhancements.

On May 23, 2017, the court sentenced Mendoza to an aggregate 13-year term, a doubled, aggravated term of six years and 7 one-year prior prison term enhancements.

DISCUSSION

The Prior Prison Term Enhancements

The record indicates that Mendoza did not have any felony convictions during the five-year period preceding Mendoza's arrest on January 9, 2006,[5] for the felony vehicle

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[4] Information in the prison packet the prosecution introduced into evidence indicates that on June 13, 2016, Mendoza's 1996 possession of drugs conviction was reduced to a misdemeanor. It does not, however, indicate whether Mendoza's 1986 petty theft conviction was ever reduced to a misdemeanor.

[5] January 10, 2001, through January 9, 2006.

theft offense he was convicted of on April 26, 2006. Mendoza's only prison custody during that period of time was for parole violations related to his 1996 drug possession conviction.[6] Mendoza contends that because his 1996 drug possession conviction was reduced pursuant to section 1170.18 to a misdemeanor "for all purposes," his prison custody attributable to parole violations for this conviction do not negate section 667.5, subdivision (b)'s washout period (see, *post*). Thus, according to Mendoza, the evidence is insufficient to sustain the court's true finding with respect to prior prison term enhancements based on convictions predating his 1996 drug possession conviction (priors 5, 6, 7, and 9) because these convictions were "washed out" for purposes of section 667.5, subdivision (b). We agree.

On November 4, 2014, California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, and it went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 (§ 1170.18) prospectively reduced certain felonies to misdemeanors for eligible offenders. It created two separate mechanisms for redesignating the convictions as misdemeanors, depending on whether the offender is currently serving a sentence for an eligible felony conviction or has completed his sentence. (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 743-744 (*Abdallah*).) Section 1170.18, subdivision (a), authorizes the court to recall and resentence eligible defendants who are currently serving a felony sentence. Section 1170.18, subdivision (f), authorizes the court to redesignate convictions for

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6 Mendoza was paroled on his 1994 robbery conviction on September 22, 1996. Since the record does not indicate that he ever absconded from the parole that attached to that conviction, September 21, 2000, was the latest date he would have been discharged from parole on his robbery conviction because his maximum period of parole of four years for that conviction would have ended on that date. (Former § 3000, subds. (b)(1) & (4)(A), § 3064.) However, Mendoza was returned to custody on his 1996 drug possession offense for parole violations on August 23, 2001, September 25, 2002, and on March 19 and September 27, 2003. Mendoza was discharged from parole on his 1996 drug possession conviction on December 5, 2003.

defendants who have already completed their sentences. (*Abdallah, supra,* 246 Cal.App.4th at pp. 743-744.)

Section 667.5, subdivision (b), imposes a one-year enhancement for a prior separate prison term served on a felony conviction. Section 1170.18, subdivision (k), provides that once redesignated, prior convictions "shall be considered a misdemeanor for all purposes," except as it relates to possession or control of a firearm, an exception not applicable here. We have held that the plain language of the statute and its "for all purposes" requirement precludes the imposition of prior prison term enhancements that are based on felony convictions that are redesignated misdemeanors prior to sentencing. (*People v. Call* (2017) 9 Cal.App.5th 856, 858; see *People v. Kindall* (2016) 6 Cal.App.5th 1199, 1205; *Abdallah*, *supra*, 246 Cal.App.4th at p. 746.)

> "The purpose of the prior prison term enhancement of section 667.5, subdivision (b), is ' "to punish individuals" who have shown that they are " 'hardened criminal[s] who [are] undeterred by the fear of prison.' " ' [Citations.] The sentence enhancement requires proof that the defendant ' "(1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) *did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction*." ' [Citations.]
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> "Courts sometimes refer to the fourth requirement, which exempts from the enhancement defendants who have not reoffended for five years, as ' " 'washing out.' " ' [Citations.] ' "The phrase is apt because it carries the connotation of a crime-free cleansing period of rehabilitation after a defendant has had the opportunity to reflect upon the error of his or her ways." ' [Citations.] 'According to the "washout" rule, if a defendant is free from both prison custody *and* the commission of a new felony for *any* five-year period following discharge from custody or release on parole, the enhancement does not apply.' [Citations.] 'Both prongs of the rule, *lack of prison time and* no commission of a crime leading to a felony conviction for a five-year period, are needed for the "washout" rule to apply.' " (*Abdallah, supra,* 246 Cal.App.4th at pp. 742-743, fn. omitted, first and fourth italics added.)

In *People v. Warren* (2018) 24 Cal.App.5th 899 (*Warren*) this court noted that: "(1) A goal of Proposition 47, when a prior offense is found pursuant to a Proposition 47 petition not to be worthy of treatment as a felony, is to relieve the defendant of the burden of a felony conviction, including the burden of a felony sentence[; and that] (2) [d]espite its literal terms, section 667.5, subdivision (b), manifests no intent inconsistent with this goal of Proposition 47." (*Warren, supra,* at p. 917.) Thus, we concluded that, "the washout provision of section 667.5, subdivision (b), should be construed to allow a prior felony to wash out provided it is followed by a five-year period free of felony convictions and incarceration in prison or in county jail pursuant to section 1170, subdivision (h), except that *such incarceration shall not prevent the prior felony from washing out if it was imposed for an offense that has been designated a misdemeanor or resentenced as a misdemeanor pursuant to a petition filed under section 1170.18*." (*Ibid*., italics added.)

In *People v. Kelly* (2018) 28 Cal.App.5th 886, 901 (*Kelly*), in finding that the Supreme Court's decision in *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*) supported the reasoning and holding of *Warren*, we stated:

> "[T]he California Supreme Court in *Buycks* held that convictions resentenced or redesignated under Proposition 47 are considered misdemeanors for all purposes and permits challenges to enhancements under section 667.5. [Citation.] The California Supreme Court found that Proposition 47 informed the voters that the act shall be broadly construed to mitigate criminal punishment and that the 'ameliorative changes are intended to "apply to every case to which it constitutionally could apply ...." ' [Citations.] We find the broad interpretation of Proposition 47 by the California Supreme Court indicates that it should likewise apply to mitigate the effects of the washout rule.
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> "Furthermore, dicta contained in *Buycks* indicates such a result. *Buycks* held that once a conviction is reduced to a misdemeanor for all purposes under section 1170.18, it is no longer a felony conviction under section 667.5[, subdivision] (b). [Citation.] In addition, in a footnote, the California Supreme Court notes that it disapproved *People v. Acosta* (2016) 247 Cal.App.4th 1072, 'to the extent that it held that the "misdemeanor for all purposes" language of section 1170.18, subdivision (k) alters only the

> status of felony convictions, *not the fact that the defendant has served a qualifying prior felony prison term* for purposes of a section 667.5, subdivision (b) enhancement.' [Citation.] This language clearly indicates that the language of section 1170.18, subdivision (k), does alter more than just the fact of the underlying felony conviction." (*Kelly*, *supra*, 28 Cal.App.5th at pp. 901-902.)

Thus, we concluded that "[t]he term 'misdemeanor for all purposes' requires courts to disregard the prior prison terms associated with redesignated convictions, and treat the convictions, punishment, and other consequences of the convictions as if they were misdemeanor convictions in the first instance." (*Kelly*, *supra*, 28 Cal.App.5th at p. 902.) In accord with *Warren* and *Kelly*, we conclude that since Mendoza's 1996 possession of drugs conviction was reduced to a misdemeanor, his prison custody attributable to that conviction did not prevent his convictions prior to 1996 from washing out. Thus, we further conclude that the evidence is insufficient to sustain the court's true finding with respect to the prior prison term enhancements that were based on prior convictions 5, 6, 7, and 9, and we will modify the judgment accordingly.

Pitchess Review

On March 20, 2017, Mendoza filed a motion pursuant to Evidence Code section 1043 and *Pitchess* seeking discovery of Bakersfield Police Officer Edgar Galdamez's personnel records. On April 12, 2017, the court granted the motion with respect to discovery of evidence or complaints of dishonesty and it conducted an in camera review of Galdamez's records. Following the in camera review, the court determined that there was no discoverable information.

The statutory scheme for *Pitchess* motions is set forth in sections 832.5, 832.7, and 832.8 and Evidence Code sections 1043 through 1047. When a defendant seeks discovery from a peace officer's personnel records, he or she must file a written motion that satisfies certain prerequisites and makes a preliminary showing of good cause. If the trial court determines that good cause has been established, the custodian of records brings to court all documents that are " 'potentially relevant' to the defendant's motion."

(*People v. Mooc* (2001) 26 Cal.4th 1216, 1226 (*Mooc*).) The trial court examines these documents in camera and, subject to certain limitations, discloses to the defendant " 'such information [that] is relevant to the subject matter involved in the pending litigation.' " (*Ibid.*) The ruling on a *Pitchess* motion is reviewed for an abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

Here, the court followed the proper procedure and created an adequate record of the in camera hearing. (See *Mooc*, *supra*, 26 Cal.4th at p. 1228.) Having examined Galdamez's personnel records, we conclude the trial court did not abuse its discretion in excluding these records from disclosure. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.) We therefore uphold the trial court's ruling.

DISPOSITION

The judgment is modified to strike the four prior prison term enhancements that are based on Mendoza's prior convictions in 1994 (Pen. Code, § 211), 1991 (Pen. Code, § 4530, subd. (b)), 1989 (Health & Saf. Code, § 11352), and 1985 (Pen. Code., § 459) and his aggregate sentence is reduced to nine years. The trial court is directed to prepare an amended abstract of judgment that incorporates these modifications and to send a certified copy to the appropriate authorities. As modified, the judgment is affirmed.